IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 742 OF 2006
ALONGWITH
CIVIL APPLICATION NO.1121 OF 2006
IN
SECOND APPEAL NO. 742 OF 2006

Shri Sahadu Maruti Badhe ..... Appellant.

V/s

Kusum Dadabhau Badhe & Ors. ..... Respondents.

Mr. P.B. Shah for the appellant.

Mr. R.S. Apte with Mr. J.D. Deshmukh for Respondent Nos. 1 to 4 and 6 to 9.

Ms. Anita Agarwal for Respondent Nos. 10 to 12.

CORAM: V.M. KANADE, J.
DATE : 18th September, 2007

P.C.:

1. Heard the learned Counsel appearing on behalf of the appellant , the learned Counsel appearing on behalf of Respondent Nos. 1 to 4 and 6 to 9 and the learned Counsel appearing on behalf of Respondent Nos. 10 to 12.

2. Appellant is the original plaintiff and respondents are

the original defendants. A suit was filed by the plaintiff in the Court of Civil Judge, Junior Division, Junnar for partition and separate possession of properties described in plaint of the said suit. It was the case of the plaintiff in the plaint that the suit properties were joint family properties and no partition of the same was effected. However, there was a temporary arrangement between the parties in regard to the suit properties. A notice for partition was given by the plaintiff to the defendants on 05/07/1986 and, thereafter, Regular Civil Suit No.138 of 1986 was filed by the plaintiff for partition and separate possession. The Trial Court dismissed the suit. An appeal which was filed against the judgment and order of the Trial Court by the appellant herein was also dismissed by the Lower Appellate Court. Hence, the appellant has filed this second appeal.

3. Mr. Shah, the learned Counsel appearing on behalf of the appellant submitted that both the Courts below had erred in relying on a partition deed which was not registered under the Registration Act and, as such, the said partition deed was not admissible in evidence. He submitted that the Trial Court also relied on the earlier partition which, according to defendants, had been effected in 1980. He submitted that even it was pleaded by defendants that a copy of the said partition deed which was effected in 1980 was not available. He submitted that even secondary evidence was not produced and, therefore, both the Courts below erred in relying on the said deed of partition which

was effected in 1987. He submitted that the plaintiff had disputed the signature on the said partition deed which was allegedly effected in 1987. He submitted that, it is a settled law that partition creates right in favour of co-parceners and, therefore, unless a partition deed is registered, the said deed is not admissible in evidence. He submitted that both the lower Courts, therefore, had committed an apparent error of law and, on that count, the judgment and order passed by both the Lower Courts was liable to be set aside.

4. Mr Apte, the learned Counsel appearing on behalf of Respondent Nos. 1 to 4 and 6 to 9, on the other hand, submitted that both the Courts below had recorded a finding of fact on the basis of the oral and documentary evidence that there was a partition between brothers. He submitted that it is permissible for co-parceners to effect oral partition and record the same in a partition memo, in which event, it is not necessary to register the said partition memo under the Registration Act. In support of the said submission, he has relied upon the judgment of the Apex Court in K.G. Shivalingappa (Dead) by Lrs and Ors Vs. G.S. Eswarappa and others reported in **(2004) 12 SCC 189.**

5. I have perused the judgment and orders passed by both the Lower Courts. Mr. Shah the learned Counsel appearing on behalf of the appellant has also taken me through the documentary and oral evidence on record which he has annexed in the additional compilation which has been filed

along with this second appeal. The submissions made by Mr. Shah cannot be accepted. Both the lower Courts have considered the oral evidence on record and have recorded a finding in view of admissions given by the witness who has been examined on behalf of the plaintiff and also the evidence of defendants witnesses that there was oral partition and this partition was recorded in partition memo. It is a well settled position in law that there is no bar for parties to effect oral partition and, thereafter, record the same in partition memo. Such an oral partition can be proved by leading oral evidence. Both the Courts below have, on the basis of the oral and documentary evidence, have held that there was a partition between parties and, on that ground, the suit was dismissed. The Apex Court in the case of K.G. Shivalingappa (supra) has observed in para 13 of its judgment as under:-

> 13. In *Nani Bai v. Gita Bai Kom Rama Gunge* [AIR 1958 SC 706] it has been held by this Court that though partition amongst the hindus may be effected orally but if the parties reduce it in writing to a formal document which is intended to be the evidence of partition, it would have the effect of declaring the exclusive title of the coparcerner to whom a particular property was allotted in partition and thus the document wold

be required to be compulsorily registered under Section 17(1)(b) of the Registration Act, 1908. However, if the document did not evidence any partition by metes and bounds, it would be outside the purview of Section 17(1)(b) of the Registration Act. This decision was followed in *Siromani v. Hemkumar* [AIR 1968 SC 1299] and *Roshan Singh v. Zile Singh* [AIR 1988 SC 881]. In *Sk. Sattar Sk. Mohd. Chaudhari v. Gundappa Amabadas Bukate* [(1996) 6 SCC 373] after analysing the judgments, referred to above, this Court observed: (SCC p.382, para 27)

> "27. Partition, specifically among the coparceners, would be a 'transfer' for purposes of the Registration Act, 1908 or not has been considered in *Nani Bai v. Gita Bai Kom Rama Gunge* [AIR 1958 SC 706] and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it wold have the effect of declaring the exclusive title of the coparcener to whom a particular property was

> alloted (by partition) and thus the document would fall within the mischief of Section 17(1)(b) of the Registration Act under which the document is compulsorily registerable. If, however, that document did not evidence any partition by metes and bounds, it would be outside the purview of that section. This decision has since been followed in *Siromani v. Hemkumar* [AIR 1968 SC 1299] and *Roshan Singh v. Zile Singh* [AIR 1988 SC 881]"

It is apparent from the ratio of the said judgment that in cases where partition among hindus is effected orally and it is reduced in writing in a formal document then, in such cases, document has to be registered under section 17(1)(b) of the Registration Act, 1908. However, if the document did not evidence any partition by metes and bounds, it would be outside the purview of section 17(1)(b) of the Registration Act, 1908. In the present case, the Lower Appellate Court has taken into consideration the evidence of defendant No.1 who has stated that there was a partition between the plaintiff and defendants in respect of the suit properties in 1980 and that specific portions were given to each of the brothers. The Lower Appellate Court also noticed that the plaintiff has examined his son Popat who has admitted in his

cross-examination that different portions were in possession of each of the brothers. The Lower Appellate Court has also taken into consideration the admissions which were given by the plaintiff in his cross-examination that he has laid a pipe line in middle portion of Gat No.1298 and that he had taken an electric connection in his name at his own cost. The Lower Appellate Court further noted that the plaintiff had admitted that defendant No.1 had taken an electric connection in his own name in Western portion out of Gat No.1298 and that he had laid the pipeline in it. It has further noted that the plaintiff, defendant No.1 and defendant No.2 are cultivating their properties separately and are residing separately in separate houses since 1984. The Lower Appellate Court, on the basis of this evidence, also has recorded a finding of fact that all the brothers were cultivating their agricultural lands separately and they took income separately and, on the basis of the said evidence, held that it was established that there was a partition between the plaintiff and defendant Nos. 1 and 2.

6. Thus, in my view, both the Courts below have recorded concurrent finding of facts. No substantial question of law is raised in this second appeal. Hence, Second appeal is dismissed.

7. Since the second appeal is dismissed, Civil Application No.1121 of 2006 does not survive and the same is disposed of accordingly.

(V.M. KANADE, J.)